IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 744 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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STATE OF GUJARAT

Versus

KATHI FAKIRA VAJSUR

Appearance:

1. Criminal Appeal No. 744 of 1985

MR MA BUKHARI,APP for Petitioner No. 1

MR AD SHAH for Respondent No. 1-3

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 15/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The State of Gujarat has challenged the judgment and order dated 29.3.1985 passed by the learned Addl. Sessions Judge, Amreli acquitting all the respondents accused for the offence punishable under section 302 read with section 34 of the IPC, section 307 read with section 34 of IPC and section 25(1)(c) of the Arms Act and under section 135 of the Bombay Police Act.

2. The prosecution case, in nutshell, can be stated as under:

The complainant Ghoha Vasta, a resident of village Gigasan and Dy. Sarpanch of Gram Panchayat, Gigasan, Taluka Dhari filed FIR with Dhari Police Station on 30.3.1984 at 5.45 p.m. wherein it was stated that there is a panchayat land adjoining to a primary school in village Gigasan. The part of the said land was given on rent to A/1 Fakira at monthly rent of Rs. 5/- by the panchayat where A/1 constructed tank for the storage of kerosene and was doing his business at that place. It is alleged that the panchayat had resolved to give the road between the primary school and the said tank to the school. Therefore, the wall was proposed to be constructed in the said land which was donated by the panchayat to the said school and two additional rooms for the school also were to be constructed. The panchayat had given contract to Sarasia Labour Cooperative Society for the said construction and the said society, in its turn, had given the said contract to one Harijan Amra Pitha. On the day before the previous day, the Overseer of the Taluka Panchayat paid visit to the said place and measured the land through Amra Pitha for the purpose of construction of wall. Therefore, on the previous day, Harijan Amra Pitha started work at site where the A/1 refused him to carry out the said work. Therefore, Amra Pitha went to the Office of the Gram Panchayat and told Sarpanch Jagu Dada, the cousin brother of the informant and Secretary Mr.Kanubhai about the said fact and also gave his application in writing. It is further alleged that in the morning of the day of the incident, Jagu Dada, PW 6, deceased Mulu Dada (also cousin brother of the informant) and informant Ghoha Vasta went to the Office of Dhari Panchayat and contacted Taluka Development Officer and informed the President Odhavjibhai. Odhavjibhai told that subcontract given to Amra Pitha be transferred to deceased Mulu Dada and that he himself and the Taluka Development Officer would pay visit to the village and that they should engage labourers and immediately start construction work as only couple of days were left; otherwise, the grant would lapse. thereafter, they went to village Gigasan. It is alleged that in the morning, Amra Pitha and one Goha

Arjan Harijan accompanied them. Goha Arjan told Amra Pitha that he was relieved from the contract and that he should call labourers engaged by him to do the labour work. At about 3.30 p.m., PW 6 Jagu Dada and deceased accompanied by two labourers Jetha and Natha went to the school and started preparation for the said work. Two teachers of the school, namely Manjibhai and one Patel were also called to help them. According to the informant, digging of foundation started at about 4.00 p.m. At that time, A/1 Fakira and his two brothers namely A/2 Bharat and A/3 Ramku came there armed with axes. Bharat was also having one tamancha (country made gun). A/1 Fakira asked not to dig the foundation. Therefore, the informant told him that the said land was of the panchayat and that it was neither of the accused nor of the informant and it was put to use for the public purpose of school. At that time, A/1 Fakira took out double bore tamancha from the right pocket of his pant and aimed at PW 6 Jagu Dada and told them to disperse. It is alleged that PW 6, at that time, told that they had not come there to pick up quarrel and that in case A/1 intends to fire, he may fire. It is further alleged that thereafter A/1 fired from tamancha aiming at PW 6 Jagu Dada as a result of which injury was caused below his right hand. Thereafter, A/1 fired another shot at PW 6 causing injury on his chest. A/2 Bharat also fired from tamancha against Mulu Dada. Mulu Dada fell down. A/3 Ramku thereafter caused injury by axe on the head of Mulu Dada. All the accused thereafter fled away. Mulu Dada who sustained serious injuries died instantaneously. It is further stated by the complainant that when the accused ran away, one Pashayata Lakhabhai of his village came at the scene of offence and he and Pashayata lifted the dead body of Mulu Dada and placed it under the shed of crude tank. The informant Ghoha and Lakha thereafter went to Dhari ST stand. PSI SG Raval, PW 20 of Dhari Police Station registered the complaint for offences punishable under sections 302, 307 of IPC, 25(1)(c) of the Arms Act and section 135 of the Bombay Police Act. Thereafter, he proceeded to draw inquest panchanama of the dead body of Mulu Dada. On the next day, he prepared panchanama of the scene of offence. Prior to that, he recorded statements of witnesses. He also drew the panchanama of clothes recovered from the dead body of Mulu Dada. He arrested the accused. As the accused showed willingness to discover the weapons used in the commission of offence, he prepared discovery panchanama at Ex. 33 to 35. He recorded further statements of informant Ghoha Vasta and Jagu Dada on 12.7.1984. After completion of investigation, he submitted chargesheet against the accused in the Court of learned Judicial

Magistrate, First Class, Dhari, who committed the case to the Court of Sessions at Amreli for trial.

3. The charge Ex. 1 was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution, to bring home the charge levelled against the accused, examined Dr. Kamlesh Bavishi, Ex.8 who examined the injured Jagu Dada, Dr. Savjibhai Sidhpura Ex. 14, the Medical Officer of Amreli Civil Hospital, who after taking X-ray of injured Jagu Dada, referred him to the Civil Hospital, Ahmedabad, Dr. Shobhna Mehta Ex.9, the Medical Officer of Primary Health Center, Dhari, who also examined injured Jagu Dada and also performed post-mortem of deceased Mulu Dada. Besides the medical evidence, the prosecution has examined Revenue Circle Inspector Kishore Anand Pandya,Ex.23. The prosecution has also placed reliance on the evidence of eye witnesses PW.5 Ghoha Vasta, Ex.25, PW 6 Jagu Dada Ex.27, PW 7 Tabha Natha Ex.28, PW 8 Jethabhai Khodabhai Ex.29, PW 9 Raiya Arjan Ex.30. Deva Arjan is examined to prove the panchanama of scene of offence Ex. 31 vide Ex.32, Vallabhbhai is examined to prove the panchanama of discovery of weapons Ex. 33, 34 and 35 at the instance of A/1, A/2 and A/3 respectively. Certain witnesses have been examined to establish the dispute relating to land. They are PW 11 Vashist Laxmilal Vora, TDO Ex.36 regarding the construction of compound wall, PW 15 Kanaiyalal Babulal Ex.40, PW 16 Lakha Bhura Ex.41, PW 17 Maganbhai Manjibhai Ex. 42 and PW 19 Amrabhai Pithabhai, Ex.56 who has not supported the prosecution and, therefore, declared hostile. Dr. K.J.Abraham, PW 18 Ex.53 the Ballistic Expert is examined to prove the opinion Ex. 54 given by him regarding the weapons used in the offence and finally, PSI SJ Raval, PW 12 Ex.58 has been examined as a police witness.

5. After appreciating the aforesaid evidence on record including further statements of the accused recorded under section 313 of the Code of Criminal Procedure, the learned trial judge was of the opinion that the prosecution, in the instant case, has not been able to establish beyond reasonable doubt the involvement of the accused in the commission of offence and, therefore, acquitted the accused of the offences for which they were charged. Hence, the present appeal.

6. We have minutely examined the evidence of aforesaid witnesses. It may be stated that A/1 Kathi Fakira expired during the pendency of the appeal. Learned APP

Mr. Bukhari has placed on record the fax message dated 29.6.2002 together with the statement of one Gatubhai Virabhai, relative of the accused and a resident of village Gigasan, recorded by Unarmed Police Head Constable of Dhari Police Station, stating that A/1 Kathi Fakira has expired before about six years at Ahmedabad. Learned Counsel Mr. A.D.Shah appearing for the accused also does not dispute this fact. He has, however, submitted that since none of the accused have contacted him though he has made sincere efforts, it is not possible for him to place on record the death certificate of A/1 Kathi Fakira. With the consent of learned advocates for the parties, we order that the appeal against A/1 Kathi Fakira Vajsur abates on account of his death.

7. Learned APP Mr. Bukhari submitted that the prosecution, in the instant case, has established the charge against the accused beyond reasonable doubt and there is no reason to discard the evidence of two eye witnesses when one out of the two is an injured eye witness, namely PW 6 Jagu Dada. He has submitted that the complaint was lodged within less than two hours at the nearest police station wherein all the particulars including the names, weapons used by the accused and the initiation of incident etc. were given. According to him, this incident happened in a broad day light; the witnesses and the accused know each other and, therefore, there is no question of any mistaken identity. It is pointed out that the medical evidence supports the prosecution case of firing and, therefore, the evidence of eye witnesses is consistent with the medical evidence. Not only that, the prosecution, in the instant case, has also established the motive for the crime as the accused objected to the construction of compound wall near the primary school which is adjoining to the crude oil tanker in the land possessed by the accused. In the submission of the learned APP, the learned trial judge has given too much importance to the so-called contradictions/ omissions and improvements in the evidence of eye witnesses which are quite minor in nature. He, therefore, submitted that the appeal is required to be allowed.

8. Learned Counsel Mr. A.D.Shah appearing for the respondents accused, on the other hand, supported the judgment of the trial court in toto.

9. We have narrated the entire prosecution case from the FIR Ex. 59 given by informant Ghoha Vasta, PW 5 Ex.25. It was recorded by PSI SG Raval of Dhari Police

Station at about 5.45 p.m. According to PW 5 Ghoha Vasta, the incident had taken place at about 3.00 or 3.30 p.m. at village Gigasan. Thereafter the complainant had gone to Police Station, Dhari and filed the complaint in a ST Bus. In the complaint Ex. 59, he has given all the details about the incident, participation by accused and the use of weapons by them in detail. The accused and the informant are residents of the same village and are also distant relatives and, therefore, they know each other. As per the prosecution case, the motive for the crime is the construction of compound wall at the instance of panchayat of which PW 6 Jagu Dada is the Sarpanch, near the primary school which is adjoining to crude oil tanker situated in the land possessed by the accused and the accused were objecting to the construction of said compound wall. As per the say of the informant, the sub contractor Amra Pitha who was to construct the compound wall was threatened by the accused not to start the construction work. The said work was thereafter transferred to deceased Mulu Dada who in the company of PW 5 Ghoha Vasta and PW 6 Jagu Dada had, in fact, started the work of digging foundation of the compound wall. As the accused did not approve the said work of construction of compound wall adjacent to their own land, they came at the spot armed with deadly weapons. The informant has clearly deposed the aforesaid facts in his evidence which are consistent with the complaint Ex. 59. Not only that, but the informant, in his evidence, has clearly involved all the accused by stating that the A/1 Fakira fired shots from tamancha on PW 6 Jagu Dada, A/2 Bharat fired shot at deceased Mulu Dada and thereafter again A/1 Fakira fired second shot on the deceased. He has also involved A/3 Ramku who inflicted axe blow on Mulu Dada and Mulu Dada fell down thereafter. PW 6 Jagu Dada, in his evidence, has totally supported PW 5, the informant on material aspects. He has stated that there was exchange of words in respect of construction work and A/1 Fakira asked them to stop the work. He has further stated that he (A/1 Fakira) thereafter took out tamancha and drove away labourers from the spot. According to him, the A/1 Fakira fired shot at him i.e. PW 6 Jagu Dada which resulted in the injury on face and chest. At that time, Mulu Dada intervened and A/2 Bharat and A/1 Fakira fired shots on Mulu Dada and thereafter A/3 Ramku inflicted axe blow on deceased Mulu Dada and thereafter Mulu Dada fell down. This witness thereafter ran away from the said place to bazar and after some time, again came to the scene of offence. Thus, both the eye witnesses have consistently deposed and have involved all the accused in the commission of offence. However, our attention is invited

by the learned Counsel appearing for the respondents accused to certain contradictions in the evidence of eye witnesses.

16.7.2002:

10. As far as the informant Ghoha Vasta, PW 5 is concerned, in his complaint, he has stated that A/1 Fakira, after some verbal exchange of words, fired shot from his tamancha on Jagu Dada, PW 6 which caused injury below the right eye and fired another shot which caused injury on the chest of Jagu Dada. he has further stated that A/2 Bharat fired from tamancha on Mulu Dada and Mulu Dada fell down. A/3 Ramku, after Mulu Dada fell down, inflicted axe blow on Mulu Dada and thereafter ran away. It is submitted that the informant Ghoha Vasta has given a complete go bye to this version before police and in his evidence, he has stated that A/1 Fakira fired shot from tamancha on Jagu Dada, A/2 Bharat fired shot on Mulu Dada and thereafter A /1 Fakira again fired second shot on Mulu Dada and A/3 Ramku inflicted axe blow on Mulu Dada and thereafter Mulu Dada fell down.

11. Similarly, PW 6 Jagu Dada, in his evidence, has stated that there were exchange of words in respect of construction work and A/1 Fakira asked them to stop the work. A/1 Fakira thereafter took out tamancha and drew away the labourers and teachers from the place. A/1 Fakira fired a shot on PW 6 which resulted into injury on face and chest. Mulu Dada thereafter intervened and A/2 Bharat and A/1 Fakira fired shots by tamancha on Mulu Dada and thereafter A/3 Ramku inflicted axe blow on the head of Mulu Dada as a result of which Mulu Dada fell down and thereafter the witnesses ran away from the said place and after some time, came back to the scene of offence. Learned Counsel for the respondents submitted that the contradictions brought on record from the evidence of both the eye witnesses clearly establish the consistency of version of both the witnesses during the investigation as to the attribution of role to each accused. However, during the course of evidence, witnesses have improved the version and given go bye to the positive statements made in the complaint. It is submitted that PW 6 Jagu Dada has adopted the same consistency in improvements during evidence and has toed the line as per the evidence of complainant. These positive contradictions clearly make improbable the prosecution version about the A/1 Fakira firing two shots from muddamal article 24. It was, therefore, submitted that this contemplates reloading of pellets with ammunition and thereafter firing another shot. That both the witnesses did not refer to this aspect; at least

reloading of pellets with ammunition definitely requires some time and it is too much to believe that having seen these accused armed with different weapons, none of them would try to run away from that place. The two shots are attributed to A/1 Fakira and according to immediate version, both shots fired by A/1 Fakira caused injury to Jagu Dada. It is further submitted that there is no case of A/1 Fakira firing from his tamancha on Mulu Dada and even before the Court during evidence, it was alleged that A/2 Bharat had fired shot from his tamancha on Mulu Dada. It is also the case of PW 6 Jagu Dada that when A/2 Bharat fired shot on Mulu Dada, no pellet from that shot had caused injury to himself. It is, therefore, submitted that considering the evidence of both the witnesses, A/1 Fakira fired two shots and thereby causing injury to Jagu Dada and Mulu Dada and A/2 Bharat firing one shot and causing injury to Mulu Dada. In substance, it is submitted that the injured PW 6 Jagu Dada received injuries below his eye and right side chest by one shot fired by A/1 Fakira. This was not the case in his police statement as according to police statement, first shot caused injury below eye and second shot caused injury on right side chest.

12. Having perused the police statement of PW 5 Ghoha Vasta and PW 6 Jagu Dada for the purpose of appreciating the submission of learned Counsel for the respondents accused, in our opinion, the so-called contradictions in the evidence of PW 5 and PW 6 are too minor which in no case adversely affect the prosecution case. On visualizing the incident, it clearly emerges that all the three accused came with weapons like tamancha and axe with predetermined mind not to allow prosecution witnesses to carry out construction work. After refusing to stop the work, A/1 Fakira fired gunshot causing injury to PW 6 Jagu Dada. Immediately thereafter, A/2 Bharat also fired a gunshot causing injury to Mulu Dada. Immediately thereafter, again A/1 Fakira fired shot at Mulu Dada and thereafter A/3 Ramku inflicted axe blow on the head of Mulu Dada. This is the consistent case of the prosecution which involves all the three accused. Even if there is some inconsistency as to whether the A/1 Fakira simultaneously fired two shots or he fired one shot and fired second shot after A/2 fired shot, would hardly change the situation. One should not lose sight of the fact that PW 5 and PW 6 are rustic villagers and are deposing after about one year before the Court and, therefore, they are bound to commit some mistake while narrating the incident. Thus, merely because the witnesses have not narrated the incident sequence-wise, it will not make their evidence unnatural or unbelievable

and that should not be a ground for rejecting their evidence.

13. We do not see any merit in the submission that since PW 5 and PW 6 are relatives of the deceased, they are interested witnesses. Admittedly, PW 6 Jagu Dada has sustained gunshot injuries. He was examined by Dr. Shobhna Mehta, PW 3 Ex.19, the Medical Officer, Primary Health Center, Dhari. According to her, PW 6 Jagu Dada came to her dispensary at about 7.50 p.m. on 30.3.1984. She examined him and noticed the following injuries on his person.

(i) Puncutred wound over lip of the nose rounded 1 mm x 1 mm depth not taken.
(ii) Punctured wound over middle of the eye brow right 1 mm x 1 mm circular depth not taken.
(iii) Punctured wound over right side of the nose 1 mm x 1 mm abrasion near it of 1/2" x1/8"x 1/8".
(iv) Contusion over right eye 1 1/2" x 1 1/2".
(v) Tender swelling over right eye 1 1/2" x 1 1/2".
(vi) Punctured wound over right clavicle middle half portion 1 mm x 1 mm circular.
(vii) Bleeding (active) from oral cavity and nose.

She referred PW 6 to Amreli for X-ray for pieces of gunshot particles over eye or nose or in chest. She opined that the above injuries were possible by fire arms. She issued certificate at Ex.26.

14. Dr. Savjibhai Sidhpura, PW 2 Ex.14, the Medical Officer, Civil Hospital, Amreli who had taken X-ray of PW 6 Jagu Dada, referred him to Civil Hospital, Ahmedabad. He has stated in his evidence that X-ray photography of head and chest was taken and it was found that there were two pellets in right orbit, one in right clavicle and one in right side of neck. He has issued certificate at Ex. 15. He has also produced X-ray plates at Ex. 17 to 19.
15. Dr.Kamlesh Bavishi, PW 1 Ex.8, Assistant Professor in Surgery, Civil Hospital, Ahmedabad, in his evidence, has deposed that he examined PW 6 Jagu Dada when he was referred to Civil Hospital, Ahmedabad by Civil Hospital, Amreli. He has deposed that X-ray photographs of skull and chest were taken and no fracture was found. He has also deposed that radio opaque round bodies of metallic density was seen over posterior aspect of right orbit region just below intra medial angle of right orbit. He has produced X-ray plates at Ex. 9 to 12. He has also produced certificate issued by Dr. Acharya at Ex. 13. From this, the prosecution has successfully established the injuries caused to PW 6 Jagu

Dada and has also established that the injuries were caused by fire arms.

16. The prosecution, in order to prove the death of Mulu Dada, has examined Dr. Shobhna Mehta at Ex.19. She carried out post-mortem of the deceased on 31.3.1984 at 8.00 a.m. She found the following external injuries on the dead body of deceased Mulu Dada which have been shown in column no.17 of the post-mortem report.

(i) Incised wound on head left side slight oblique extending from 1" lateral to left eyebrow passing along maxillary arch crossing near left ear passing just above from hakix of external left to occipital bone crossing temporal bone. Size 7"x2"x4" near left eye the depth of the wound was 2" about.

(ii) Multiple circular punctured wounds scattered over right lumber region, right hypochondriac region, right iliac fossa, right upper 1/3rd of the thigh medially and laterally 3 to 4 punctures over left iliac fossa. Five wounds (punctured) are as shown in figure. Some of them having only superficial abrasions 1mm x 1mm. Some of them producing separate opening. Variable depth slight blackening at some openings, bleeding all places.

She has opined that the cause of death was as a result of extensive injury to fatal organ brain, haemorrhage and shock. She opined that the external injury no.1 could be caused by axe. She also opined that the injury no.2 could be caused by fire arm. She has also opined that the injury on the person of Mulu Dada could be caused by tamancha article 26.

From the medical evidence on record, it is clear that Mulu Dada died and his death was unnatural and homicidal.

17. Thus, the evidence of PW 5 and PW 6 also gets corroboration from the medical evidence inasmuch as PW 6 Jagu Dada sustained fire arm injuries and deceased Mulu Dada sustained fire arm injuries as well as axe injury, the latter proved to be fatal. There is no reason to doubt the version given by these eye witnesses as they had no axe to grind against the accused. The accused, on the contrary, had a strong motive against prosecution witnesses as the prosecution witnesses had started construction of compound wall at the place which was just adjacent to the crude oil tanker situated on the land possessed by the accused and the accused had objected to

the construction of said compound wall. In our opinion, the learned trial judge has given too much importance to the minor contradictions, omissions and improvements made by PW 5 and PW 6. The learned trial judge has totally misdirected himself while passing the order of acquittal.

18. Learned Counsel Mr. Shah submitted that recovery of muddamal article 24, a country made handgun shows that it is muzzle loading and cartridge cannot be used. He has further submitted that none of the witnesses refer about A/1 reloading of the handgun by refilling lead shots with ammunition and thereafter second shot being fired. He submitted that find of one empty cartridge case of K.F.12 bore shotgun cartridge from the scene of offence establishes that whoever has used the firearm has reloaded the said firearm. It is also clearly established by evidence of Expert that empty cartridge case found from the scene of offence (muddamal article no.12) was fired from muddamal article no.26. It is, therefore, submitted that this would clearly establish that the article 26- Single Barrel Breech Loading country made handgun was fired and thereafter the same was unloaded. The unloading of the fired cartridge case can be for the purpose of refilling another cartridge and firing second shot. It is, therefore, submitted that the possibility of only one weapon having been fired twice also cannot be ruled out.

19. Frankly speaking,we are not impressed by the submissions of the learned Counsel. Dr.K.C.Abraham, PW 18 Ex. 53 who is a Ballistic Expert is examined by the prosecution in the instant case. He, in his evidence, has deposed that on 1.5.1984, in connection with CR No. 14 of 1985, four sealed parcels were received from Dhari Police Station for examination. The said parcels were properly sealed as per the specimen of seal. In the parcel, there was ex/Mark/E(a). The said ex/E was one single barrel muzzle country made handgun (article 24).

Ex.E(a) was one deformed percussion cap found on the nipple of the handgun Ex.E. The parcel E1 contained three partially deformed lead shots. The weight of each such lead shot was 0.2 gms. In parcel F, there was one single barrel breech loading country made handgun (article 26). Further, the length of its barrel was about 14 cms. Parcel F1 was a cartridge case of K.F.12 bore shotgun having identification mark on the cap. All the parcels contained slips of panchanamas.

This witness has given result of his examination. Ex.E was a muzzle loading handgun having single barrel

which was in working condition. The residues of fire gun powder were detected in the barrel and thereby it transpired that the said Ex.E was used for firing prior to its receipt by the laboratory. However, it cannot be said as to the time of firing (i.e. when it would have been used). Before testing this handgun in laboratory, it was loaded and was successfully test fired in the laboratory. When fired, this handgun would have caused injury to a person. He has further deposed that Ex.F was a single barrel breech loading country made handgun having capacity of chambering and firing 12 bore shotgun cartridge. The remains of fired gun powder were found in the barrel. From the wash that was taken of the barrel before test firing the same in the laboratory, it transpired that the same was used for firing before it was received in the laboratory. It cannot be said as to at what time, the same was used. Three K.F.12 Bore shotgun cartridges were successfully test fired from the said handgun and one such test fired empty cartridge was kept in the parcel F1 along with Ex.F1.

This witness has been cross examined at length.

This witness has stated in his cross examination that the diameter of article no.24 is 1.45 cms. In this handgun, loose lead balls can be loaded and fired. In the said muddamal, if the lead balls/ shots were there in the cartridge, same can be removed and the lead shots with ammunition can be filled in in muddamal article no.24 and can be fired. The cartridges of 12 bore shotgun can be refilled. For this purpose, refilling machine is also available and the same can be filled even manually. In the 12 bore cartridge, three wicks can be filled or it can be with four wicks. In the cap of this cartridge, card box wads is there and not plastic. When this cartridge is fired, wad also comes out along with lead shots and if firing is made from close distance, wads may also pierce in the body. For filling lead shots in the handgun at muddamal gun no.24, paper or cloth wad are used. If firing is made from close distance, the wads may also pierce body. If firing is made from long distance, the same will not pierce the body and will fall somewhere. If the cartridge of 12 bore is used and if it does not pierce the body, the same can be found from the ground. This witness has agreed with the opinion given in the book at pages 232 and 233 of Dr. Modi's Medical Jurisprudence, 20th edition and has also agreed with the opinion given at page 279 of Dr. Parikh's Text Book on Medical Jurisprudence, 1979 edition.

He has further deposed that article no.26 breech

loading handgun is of 2.16 cm diameter. Article no.24's effective range depends on how much gun powder is filled therein. Since he has not made experiment with regard to article no.24, he cannot say its effective range. The effective range of article no.26 breech loading handgun is 20 yards. He has also deposed that he has not examined as to what extent the lead shots would spread on firing from these two handguns at a distance of twelve feet and, therefore, he cannot express any opinion. According to him, ordinarily, if the handgun of country make is used, then it can give spread of five to eight inches from a distance of twelve feet and there is no special pattern for this country made handgun. Therefore, it can be said that when such handgun is fired at a distance of twelve feet, then its lead shots may simultaneously pierce in lump which is possible. If the handgun is fired at a distance of four or six feet, the spread would be less than what is stated by this witness. At this time also, there are possibilities that some lead shots may pierce simultaneously in lump. This witness has not agreed to the suggestion that after the cartridge is loaded in muddamal article 26 and after firing from it, there would be breech face print on the base of cartridge. On seeing breech face of handgun article no.26, he has stated that face print should definitely come from it. He has also deposed that after firing from article no.26, empty cartridge that remains therein can be taken out in two ways; one by extractor and second by hand. If an iron rod is hit from the above portion of barrel, then also it can come out. In ordinary course, for taking out cartridge, extractor is used. After firing is made once, without taking out the empty cartridge, second fire cannot be made. For loading article no.24, it has to be used. If the article no.24 is to be loaded again and if a person is an expert, then the same can be loaded again within half a minute. At such time, percussion cap is required to be placed thereon.

20. Reading the evidence of Ballistic Expert, it is clear that both the tamanchas (handguns) articles 24 and 26 were used for firing before they were received in the laboratory. The remains of fired gun powder were found in the gun. It is also clear that tamancha article 24 can be loaded again within half a minute. Therefore, simply because none of the witnesses referred about A/1 Fakira loading handgun by refilling lead shot with ammunition, it will not make their evidence unbelievable. If half a minute time is required for reloading of the handgun by refilling lead shot and if such minor details are not coming from the mouth of witnesses, it cannot be

held that article 24 tamancha was not at all used by A/1. As the entire incident was over within minutes, one may not give all such minute details. Article 24 is a single barrel mother loading handgun, cartridge cannot be used which requires reloading by refilling lead shot with ammunition before the second shot is fired. This is consistent with the say of eye witnesses when they say that A/1 Fakira did not fire second shot simultaneously, but fired two shots and in between the said two shots, one shot was fired by A/2 Bharat with single barrel breech loading country made handgun (article 26). We, therefore, see no merit in the submissions of learned Counsel for the respondents. Even if we accept the submission advanced on behalf of the accused, one thing is clear namely Mulu Dada did not die because of fire arm injury as he succumbed to head injury caused by A/3 Ramku with axe. There is a consistent evidence that all accused came with tamanchas and axe and they used their respective weapons. In that case, all can be convicted under section 302 read with section 34 of the IPC.

21. Learned Counsel for the respondents submitted that the evidence of recovery / discovery is not reliable inasmuch as the investigating officer has used the same persons as witnesses/ panchas. He has submitted that there is no statement establishing 'authorship of concealment' by any of the accused before panchas or investigating officer. Finally, he submitted that the recovery of knife, though not attributed at all by any of the witnesses to A/3 Ramku, clearly reflects the nature of investigation by police to show that find of Scabbord at the place of scene of offence is corroborated by recovery of knife. In the submission of learned Counsel, none of the witnesses refer to A/3 Ramku taking knife from Scabbord. Therefore, the find of Scabbord at the scene of offence creates doubt about the version of prosecution witnesses.

22. We do not see any merit in this submission. Having accepted the oral testimony of prosecution witnesses as reliable and trustworthy, even if recovery/ discovery of weapons is not established, the case of the prosecution does not fail. In the instant case,in our opinion, the prosecution has successfully established the recovery/ discovery of weapons through the evidence of PW 10 Vallabhbhai Bhurabhai Ex. 32, the panch who has proved the panchanama of discovery of weapons Ex. 33,34 and 35. There is no rule that the investigating officer should engage different persons to act as panchas to effect discovery of different weapons. We, therefore, see no infirmity in this regard. Since it is not the caseof prosecution that A/3 Ramku also took out knife and used it in the commission ofoffence, mere discovery of

Scabbord at the scene of offence will not lead us anywhere. We hardly give any importance to the same.

23. Thus, taking the overall view of the matter, we are clearly of the opinion that the learned trial judge has committed serious error in acquitting the accused for the offence of murder of deceased Mulu Dada and causing injury to PW 6 Jagu Dada. The learned trial judge,in our opinion, has totally misdirected himself in rejecting the evidence of eye witnesses on flimsy and untenable grounds and, therefore, the impugned judgment is unsustainable. In our opinion, the evidence of PW 5 and PW 6 is reliable and trustworthy. From the evidence, it is established that all the accused, with a strong motive, with premeditation, assaulted the deceased in cruel manner when the deceased, with the help of PW 5 and PW 6, were carrying out the work which they were legally entitled to do. The deceased and prosecution witnesses were unarmed. We are conscious of the fact that this being a acquittal appeal, after lapse of so many years, disturbing the acquittal order at such a belated stage would adversely affect the accused. Normally, when two views are possible, this Court should not change the finding of acquittal recorded by the trial court. However, taking into consideration the facts involved in the present case and taking the overall view of the matter, we are clearly of the opinion that no second view is possible especially when the involvement of the accused is clearly established beyond any doubt. We accordingly hold that all the accused are responsible for committing offence punishable under sections 302, 307 read with section 34 of the IPC. Since the accused no.1 Fakira has expired and appeal against him stands abated, the A/2 and A/3 are convicted for the offence punishable under section 302 read with section 34 of IPC. Since it has come in the evidence that A/1 Fakira fired at PW 5 Jagu Dada and injured him,he was convicted along with other accused for the offence punishable under section 307 read with section 34 of the IPC. However, in view of the fact that since A/1 Fakira has expired during the pendency of the appeal, we are not convicting A/2 and A/3 for offence punishable under section 307 read with section 34 of IPC.

24. In the result, this appeal is allowed. The judgment and order dated 29.3.1985 passed in Sessions Case No. 22 of 1984 by the learned Addl. Sessions Judge, Amreli acquitting the respondents accused is set aside. Appeal against accused no.1- Kathi Fakira Vajsur stands abated.

Accused no.2 - Kathi Bharat Vajsur and accused no.3- Kathi Ramku Vajsur are convicted for offence punishable under section 302 read with section 34 of IPC and they are sentenced to suffer imprisonment for life

and to pay a fine of Rs. 1000/- each, in default, to undergo further R.I. for six months. Bail-bonds shall stand cancelled.

Warrant of arrest to be issued and served through Dhari Police Station.

(Kshitij R.Vyas,J.)

(Kamal M.Mehta,J.)

sonar/-